In the High Court of Judicature at Madras

Dated:08.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.832 OF 1997

Lalithammal ..Appellant/Defendant

v

T.Mohan Das ..Respondent/Plaintiff

This second appeal is filed u/s 100 CPC against the judgment and decree dated 25.6.1996 made in A.S.No.150 of 1994 on the file of the Court of Third Additional District Judge, Salem confirming the decree and Judgment made in O.S.No.1118 of 1987 dated 25.4.1994 on the file of the Court of Additional District Munsif, Salem.

For Appellant : Mr.K.Raman Raj
for M/s R.M. Krishna Raju.

For Respondent : Mr.C.R.Dhasarathan

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.150 of 1994 on the file of the Court of III Additional District Judge, Salem. The defendant, who has lost her defence before the Courts below, is the appellant herein.

2. The short facts of the plaint for the purpose of deciding this appeal sans irrelevant particulars are as follows:

The defendant Lalithammal is the second wife of late Dr.K.Govindarajulu, whose youngest sister's third son is the plaintiff. The plaintiff was very much attachehd to the said Dr.K.Govindarajulu and was very helpful to him more like his son. The defendant had no issues male or female. She was very quarrelsome and showed scant respect to her husband during his life time. Dr.K.Govindarajulu had inherited properties from his father and he also acquired properties in his name from his self earnings in his profession. Dr.K.Govindarajulu died on 19.12.1976 and his obsequies were performed by the plaintiff. Dr.K.Govindarajulu had executed a Will dated

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18.2.1972 and deposited with the Registrar of Assurances, Salem. In the said Will, the testator had given life estate to his second wife ,the defendant herein over all the properties.

2a) On 11.1.1977, the Will was opened after the removal of the seal and registered as document No.8 of 1977. The Will was executed by the testator while he was in a sound state of health and mind and attested by five respectable witnesses comprising of a Doctor, police and Retired Head Constable and Officers in Government Services. In the said Will life interest was given to the defendant in respect of door Nos.14 and 15 Bretts Road, Salem. She should maintain the building in a good condition. After her death, the plaintiff and his heirs and successors in title shall be the sole and absolute owners of the said property included as Schedule "B " property of the said Will. The plaintiff came to know that the defendant was arranging to sell the suit property . Hence, the plaintiff issued a lawyer's notice on 24.2.1987 calling upon the defendant not to alienate the suit property contrary to the terms of the said Will. The plaintiff has also published a notice in the Tamil Daily of Salem Edition dated 6.3.1987. The defendant has issued a reply notice in one issue of 'Thinathanthi' dated 9.3.1987 containing false and reckless statements. Hence the plaintiff has come forward with the suit for permanent injunction restraining the defendant in any manner of alienating or encumbering the suit property scheduled to the plaint.

3. The defenant in her written statement would contend that during the life time of her husband, the plaintiff's mother wanted to interfere with them and always she was instrumental for the quarrel with her husband. Only due to her inducement and during the unsound mind of her brother, she got the alleged Will executed for her group's favour without the knowledge and consent of the defendant while he was of unsound mind. The husband of the defendant had lost the mental balance previously on two occasions and had treatment both at Madras and Bangalore. Subsequently, he celebrated his Sashtiyapthapoorthi on 22.3.1971. After few months, he was not keeping good mental stability. The plaintiff's mother who is the sister of the deceased Dr.K.Govindarajulu used to come often and met him. The brother of the plaintiff viz., Jagadeesan, used to supply liquors to Dr.K.Govindarajulu. It seems that the plaintiff and his mother and brother had managed to get some document ie., Will from him when he was not in a sound disposing state of mind. Dr.K.Govindarajulu acquired properties in his name from his self earnings in his profession is wrong. The husband of the defendant inherited only his residential house at 57, Kurumbar Street,Salem -1. Other properties were purchased from the funds of the defendant but sale deed and mortgage deed were taken on her husband's name as he was the male member of the family.

3a) It is false that obsequies were performed by the plaintiff as decided in the Will executed by them on 18.2.1972 and deposited with the Registrar of Assurances, salem. The defendant has performed the funeral ceremonies and met all the expenses. All the suit properties are the self

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acquired properties of the defendant as she purchased from her own funds in which her husband had no right title or possession and he is not entitleld to execute any will in respect of suit properties. . Therefore, the plaintiff has no right to claim the defendant's properties as the properties of her husband and under the cover of alleged Will executed during unsound state of mind of the testator.

3b) For the notices and publications in the papers, the defendant issued reply notice and published the reply in the papers. The plaintiff along with his brother, mother and sister of his mother and her son issued notice dated 22.2.1977 through their then counsel for which the defendant has sent a suitable reply dated 4.3.1977. The plaintiff did not take any step to get probate or letter of administration in respect of the said Will. The plaintiff cannot claim any right or title under the said Will. It is only to harass the defendant and give trouble, the suit has been filed without any cause of action. The properties are house properties situate in the midst of Salem Town and it is worth more than Rs.3,00,000/-. The Court fee paid under the plaint is not correct. Hence the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed seven issues for trial. Before the trial Court, P.W.1 to P.W.3 were examined and Exs P1 to P13 were marked on the side of the plaintiff. D.W.1 was examined and Exs B1 to B3 were marked on the side of the defendant.

5. On the basis of evidence both oral and documentary, the learned trial Judge has come to a conclusion that the plaintiff has proved the alleged Will Ex A1 and accordingly decreed the suit as prayed for without costs. Aggrieved by the findings of the learned trial Judge, the defendant has preferred an appeal in A.S.No.150 of 1994 before the III Additional District Judge, Salem, who after scanning the entire evidence both oral and documentary has dismissed the appeal confirming the decree and Judgment of the trial Court. Hence the defendant is before this Court by way of Second appeal.

6. The substantial question of law involved in this appeal is

> " Whether the respondent's suit in O.S.No.1188 of 19897 for bare injunction on the basis of an alleged Will dated 18.2.1972 under Exs A1 and A13 is maintainable when the genuineness and the due execution of the Will have been denied and disputed by the appellant herein in accordance with Sections 57 and 369 of the Indian Succession Act, 1925, and for want of legal proof under Section 68 of the Evidence Act?"

7. Heard Mr.K.Raman Raj, learned counsel appearing for the appellant and Mr. C.R.Dhasarathan, learned counsel appearing for the respondent and considered their respective submissions.

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8.The Point:

Before the trial Court, Ex A1 Will has been proved by the plaintiff by examining one of the attestors to the Will. There are five witnesses to EX A1 Will. P.W.3 Sundaresan, S/o Srinivasa Iyer, is the third witness to Ex A1. The learned counsel appearing for the appellant would contend that his evidence cannot be taken into consideration on the ground that he has not seen the testator Dr.K.Govindarajulu signing the document in Ex A1. But a reading of his deposition would go to show that in clear terms , he has stated that the original of Ex A1 Will was written by Govindarajulu in his own hand writing and it was brought by Dr.K.Govindarajulu after signing the same. So under such circumstances, the contention of the learned counsel appearing for the appellant that P.W.3 has not seen the testator signing the disputed Will Ex A1, his evidence cannot be given any credit to is unsustainable. Both the Courts below have concurrently held that the plaintiff has proved Ex A1 Will by examining one of the attestorr to Ex A1 Will, which is a mandatory requirement under law , to prove the Will..

9. The next point urged before this Court by the learned counsel appearing for the appellant is that exceept Item No.1 property, the remaining properties including the property scheduled to the plaint are all purchased by Dr.K.Govindarajulu out of the joint earning of Dr.K.Govindarajulu and the defendant. Even though, there is a plea in the written statement filed by the defendant at paragraph 4 to that effect there is no whisper about the joint earning in the defendant's reply notice Ex A12 dated 4.3.1977. The defendant has examined herself before the trial Court as D.W.1. Only in her evidence, she raises a defence of 'benami transaction'. But she has not produced any document to show that she was also earning at the time of purchase of properties scheduled to Ex A1 Will. The learned counsel appearing for the appellant would represent that the defendant is a daughter of a Doctor. The above status of the defendant will derive us to come to a conclusion that in the absence of any documentary evidence to show that the properties scheduled to the plaint were purchased out of the joint income of Dr.K.Govindarajulu and the defendant, it is to be presumed that the properties are the self acquired properties of Dr.K.Govindarajulu. . In the chief Examination, D.W.1 would depose that she denies that after her life time, the plaintifif is entitled to inherit the plaint schedule property as per the terms of Ex A1 Will. But a reading of Ex A1 Will go to show that the properties were self acquired properties of Dr.K.Govindarajulu and that the defendant is the second wife and that the matrimonial life between Dr.K.Govindarajulu and the defendant (Second wife) was not very cordial and hence the testator had decided to give only life estate to the defendant and Item No.1 to the schedule to Ex A1 Will is said to be inherited by the testator under a partition deed dated 27.8.1901 and that other properties were purchased out of his own income. The intention of the testator is that the defendant is to be given only the life estate in respect of his properties scheduled to Ex A1 but after her death, it must

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go to the plaintiff who is the sister's son of the testator.

10. The important question raised before this Court by the learned counsel appearing for the appellant is that since Ex A1 Will is not probated, it cannot be said to be a valid Will and he also draw the attention of this Court to Section 213 of Indian Succession Act ,1925 which runs as follows:

> "No right as executor or legatee can be established in any court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.
> 2. This Section shall not apply in the case of Wills made by Muhammadans or Indian Christians and shall only apply-
>
> (i) in the case of Wills made by any Hindu, Buddhist, Sikh, or Jaina where such Wills are of the classes specified in clauses(a) and(b) of Section 57; and
>
> (ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act,1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits."

Admittedly, Ex A1Will was executed and registered at Salem. Under such circumstances, it is not mandatory under Section 213 of the Indian Succession Act 1925 to probate the same since the Will was not executed in the Metropolitan Cities like Calcutta, Madras or Bombay.

11. The learned counsel appearing for the appellant would rely on Antony Chelliah-vs- Mariyal and three others(1997(1)CTC 144) and contended that even if a Will executed at Kovilpatti, it was held that it is mandatory to probate the same. But a reading of the said ratio will clearly go to show that Mariya Antony had executed a Will bequeathing the suit item Nos.1 and 3 in favour of the first defendant on 24.1.1967 and the said Mariya Antony died on 29.1.1968. In the said case, the first defendant claimed right in respect of those properties under the Will as well as by way of adverse possession in respect of Item Nos. 2 and 4. The trial Court has dismissed the suit but on an appeal in A.S.No.182 of 1979 on the file of the Court of Subordinate Judge, Tuticorin, the appeal was allowed thereby granting a decree for partition and separate possession of plaintifif's 1/3 share in all the items. Hence the second appeal was

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preferred before this Court wherein it has been held by the learned Judge of this Court as follows:

> " I have carefully considered the submissions of the learned counsel for the appellant Section 213 of the Indian Succession Act mandates that no right as executor or legatee can be established in any Court of Justice, unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed. There is no controversy that this provision applied to the parties in this case. A Full Bench of this Court in Ganbhamdas.v.Gulabbi, ILR 50.Mad.927 held that the plaintiff being a heir under the intestacy, which must be presumed until a Will is proved, is entitled to succeed to the property, unless it can be shown that his title has been displaced and the mere existence of the Will does not necessarily displace the plaintiff's title. It was also held therein that it is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the Will and this he cannot do by virtue of the provisions of Sec.187 of the old Act, presently Sec.213 and the defendant is also not entitled for that purpose to use an unprobated Will even as a defence."

Admittedly, the parties in the above said case are christians governed by Indian Succession Act but the parties herein and the testator herein of Ex A1 'Will' are admittedly Hindus. So I am of the opinion that Ex A1 Will need not mandatorily be probated. So the above said ratio relied on by the lelarned counsel for the appellant will not be applicable to the present facts of the case.

12. The learned counsel appearing for the appellant relying on Chandra Kishore Dikshit .v.Sukh Swarupanand Dikshit and others(AIR 2006 Allahabad 86) and contended that even in the said case where the parties are Hindus, Will was probated and the validity of the same was questioned by the appellant. Relying on the observation at paragraph 18 of the said Judgment wherein which is extracted below.

> " In Suit No.471 of 1949 Champa Devi had questioned the Validity of the Will said to have been executed by Shambhu Dayal Shastri on 12.4.1974. The cause of action thus arose for getting the Letters of Administration or Probate on the date when Champa Devi questioned the validity of the Will in O.S.No.471 of 1949".

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So under 213 of the Indian Succession act, Will executed by a Hindu need not mandatorily be probated and on the other hand, if the Will is executed within the jurisdiction of Metropolitan Cities like Calcutta, Madras and Bombay, the Willl is necessarily to be probated. But the same will not be an embargo on a Hindu to probate the Will. In the above said ratio relied on by the learned counsel appearing for the appellant even though the parties were Hindus, the testator who had executed a Will therein had probated the same. So the contention of the learned counsel appearing for the appellant that every Will shall be probated holds no water. Under such circumstances, I do not find any reason to interfere with the concurrent findings of the Courts below, which are neither illegal nor infirm to warrant any interference from this Court. Point is answered accordingly.

13. In fine, the appeal is dismisised confirming the decree and judgment in A.S.No.150 of 1994 on the file of the Court of Third Additional District Judge, Salem. With costs.

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Third Additional District Judge, Salem.

2. The Additional District Munsif, Salem.
3. The SEction Officer, V.R. Section, High Court, Chennai.
+ One cc to Mr. R.M. Krishna Raju, Advocate sR 14346
NG (co)
sg 10/4/07

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